89- 1394

No. _____

Supreme Court, U.S.
FILED
DEC 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

NICHOLAS PENA,

Petitioner,

-vs-

JOHN F. NICHOLS,
SHERIFF OF OAKLAND COUNTY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

ROBERT C. WILLIAMS
CHIEF, APPELLATE DIVISION

By: MICHAEL J. MODELSKI
PAUL J. FISCHER
Counsel of Record
Assistant Prosecuting Attorneys
1200 North Telegraph Road
Pontiac, Michigan 48053
(313) 858-5557

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

BEST AVAILABLE COPY

13pp

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES ii

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT:

I. THE WRIT OF CERTIORARI FILED HEREIN SHOULD BE DENIED FOR FAILURE TO FILE SAME WITHIN THE TIME PERIOD PROVIDED BY SUPREME COURT RULE 20.1. 4

II. GIVEN THE LIMITED SCOPE OF INQUIRY IN A HABEAS CORPUS PROCEEDING CHALLENGING EXTRADITION, THE QUESTION OF WHETHER PETITIONER COMMITTED A CRIME IN TEXAS IS FOR THE TEXAS COURTS. 5

CONCLUSION AND PRAYER FOR RELIEF 9

INDEX OF AUTHORITIES

PAGE

CASES:

Durham v *United States*, 401 US 481, 91 S Ct 858, 28 L Ed 2d 200 (1971) 5

Eroh v *Manistee Sheriff*, 86 Mich App 545, 272 NW2d 681 (1978) 6

Heflin v *United States*, 358 US 415, 79 S Ct 451, 3 L Ed 2d 407 (1959) 5

Michigan v *Doran*, 439 US 288, 99 S Ct 530, 58 L Ed 2d 521 (1978) 7-8, 9

Pacileo v *Walker*, 449 US 86, 101 S Ct 308, 66 L Ed 2d 304 (1980) 9

Schacht v *United States*, 398 US 58, 90 S Ct 1555, 26 L Ed 2d 44 (1970) 5

Taglianetti v *United States*, 394 US 316, 89 S Ct 1099, 22 L Ed 2d 302 (1969) 5

RULES OF THE U.S. SUPREME COURT *(PRE-1990 AMENDMENTS):*

Supreme Court Rule 20 4

Supreme Court Rule 20.1 ..... 4, 5

Supreme Court Rule 20.3 4

No. _____

In The

Supreme Court of the United States

October Term, 1989

NICHOLAS PENA,

Petitioner.

- vs -

JOHN F. NICHOLS,
SHERIFF OF OAKLAND COUNTY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

The account of the relevant proceedings set forth in Petitioner's petition is essentially correct. However, his summary of the Opinion of the Court of Appeals at "A" and his formulation of one of the Questions Presented For Review "C.1." are argumentative and inaccurate since Petitioner is, in fact, charged with a crime in Texas. As Petitioner sets forth, the Bill of Indictment charges in pertinent part that Nicholas Pena:

> . . . on or about the 14th day of April in the year of our Lord One Thousand Nine Hundred and Eighty-Seven in the County and State aforesaid, did unlawfully, then and there, intentionally and knowingly, with intent to establish, maintain, and participate in a combination, and in the profits of a combination, conspire to

commit the aggravated offense of unlawful delivery of a usable quantity of a controlled substance, to-wit: marihuana, in an amount of more than 200 pounds, but less than 2,000 pounds, with W. T. BROWN, NICKEY DALE RUTLEDGE, FREDDIE CASTILLO, and YSIDRO CASTILLO, SR., and did then and there agree among themselves and with each other, to engage in conduct constituting said offense, namely, to intentionally and knowingly deliver a usable quantity of a controlled substance, to-wit: marijuana, in an amount of more than 200 pounds, but less than 2,000 pounds, and in pursuance of such agreement and in furtherance thereof, the said NICHOLAS PENA, W. T. BROWN, NICKEY DALE RUTLEDGE, FREDDIE CASTILLO, and YSIDRO CASTILLO, SR., performed overt acts as follows, to-wit:

(1) On or about March 14, 1987, in Oakland County, Michigan, W. T. BROWN allowed his vehicle to be used for the transportation of a usable quantity of marihuana.

(2) On or about March 14, 1987, in Oakland County, Michigan, NICHOLAS PENA transported a usable quantity of marihuana in W. T. BROWN's vehicle.

(3) On or about March 25, 1987, in Ellis County, Texas, NICKEY DALE RUTLEDGE and FREDDIE CASTILLO, participated in a telephone conversation wherein NICKEY DALE RUTLEDGE and FREDDIE CASTILLO discussed the delivery of a usable quantity of marihuana.

(4) On or about April 14, 1987, YSIDRO CASTILLO, SR., in Navarro County, Texas,

knowingly and intentionally possessed records of transactions involving the purchase and sale of marihuana.

(5) On or about April 14, 1987, YSIDRO CASTILLO, SR., in Navarro County, Texas, knowingly and intentionally possessed a usable quantity of marihuana in an amount less than 2,000 pounds but more than 200 pounds.

Petitioner in the briefs he filed in support of his petition for a writ of habeas corpus in both the Michigan Court of Appeals and Michigan Supreme Court admitted on page 2 of each:

> There is no question that the extradition papers in this case are in proper form on their face and that the Appellant is the person named therein.

The United States Court of Appeals for the Sixth Circuit in its Order of October 12, 1989 denied Petitioner's application for a certificate of probable cause, stating:

> In this case, Pena has admitted that the documents are valid on their face and that he is the person sought by the State of Texas. The copies of the indictments in the record show that they clearly allege that Pena has committed a crime in the State of Texas. Finally, even though Pena is not technically a fugitive, he does fall within the range of persons permitted to be extradited by virtue of a Michigan statute. Mich. Comp. Laws Anno. § 780.3a (West 1982); *Eroh* v. *Manistee County Sheriff*, 86 Mich. App. 545, 550 [272 NW2d 681] (1978). Under the limited standard of review of extradition decisions, Pena is not entitled to relief.

A petition for Writ of Certiorari was filed in this Court by Petitioner's counsel on or about December 28, 1989. Petitioner did not obtain or apply for an extension of time for filing the petition.

REASONS FOR DENYING THE WRIT

I.

THE WRIT OF CERTIORARI FILED HEREIN SHOULD BE DENIED FOR FAILURE TO FILE SAME WITHIN THE TIME PERIOD PROVIDED BY SUPREME COURT RULE 20.1.

In the case at bar, the order of the United States Court of Appeals for the Sixth Circuit denying Petitioner's application for a certificate of probable cause was filed on October 12, 1989. Petitioner subsequently filed a petition for Writ of Certiorari in this Court on or about December 28, 1989. The Respondent submits that the petition for Writ of Certiorari should be denied for failure to file same within the time period provided by Supreme Court Rule 20.1. (The new time period of 90 days under Amended Rule 13.1 was not in effect until January 1, 1990.)

Rule 20.1 provides that a petition for Writ of Certiorari to review the judgment in a criminal case of a federal Court of Appeals shall be deemed in time when it is filed with the Clerk within sixty (60) days after the entry of such judgment. Rule 20.3 provides that the Clerk will refuse to receive any petition for Writ of Certiorari which is jurisdictionally out of time.

Decisions of this Court which have interpreted the former Rule 22, the predecessor to the current Rule 20, have held that the time limitation contained therein for filing of a petition for Writ of Certiorari was not jurisdictional, and could be relaxed by the Court, in the exercise of its discretion, when the ends of justice so

required. Thus, in certain cases where the Petitioner has shown good cause for a delay in filing, it has been found that waiver of the rule's time requirements was appropriate. *Durham* v *United States*, 401 US 481, 91 S Ct 858, 28 L Ed 2d 200 (1971); *Schacht* v *United States*, 398 US 58, 90 S Ct 1555, 26 L Ed 2d 44 (1970); *Taglianetti* v *United States*, 394 US 316, 89 S Ct 1099, 22 L Ed 2d 302 (1969); *Heflin* v *United States*, 358 US 415, 79 S Ct 451, 3 L Ed 2d 407 (1959). It has been noted, however, that the court's procedural requirements are essential to an orderly appellate process, and that the court's discretion to permit a waiver of those requirements should therefore be exercised sparingly, and only when an adequate reason exists to excuse noncompliance with the rules. *Schacht* v *United States, supra.* (Justice Harlan, concurring).

In the present case, the petition for Writ of Certiorari was filed over two weeks after the expiration of the sixty-day time period provided by Rule 20.1. Petitioner did not obtain or apply for an extension of time for filing his petition in accordance with the Court's rules. Nor has he offered any explanation to the Court for the delay, or shown any extenuating circumstances such as those which were found in the above-cited cases. Accordingly, the petition for Writ of Certiorari filed herein should be denied for failure to file same within the time period provided by Rule 20.1.

II.

GIVEN THE LIMITED SCOPE OF INQUIRY IN A HABEAS CORPUS PROCEEDING CHALLENGING EXTRADITION, THE QUESTION OF WHETHER PETITIONER COMMITTED A CRIME IN TEXAS IS FOR THE TEXAS COURTS.

Petitioner contends he cannot be charged with being involved in a conspiracy in Texas. He tries to buttress

his claim by making allegations and speculating as to the motives of Texas and Michigan law enforcement authorities and as to all the evidence in the case. Respondent submits that this Court is not the proper forum for the issues Petitioner seeks to raise. Given the limited purpose of a habeas proceeding involving extradition, these issues were irrelevant and could only be properly dealt with in Texas in light of Texas law.

The limited purpose of a habeas proceeding is clear. In *Eroh* v *Manistee Sheriff*, 86 Mich App 545, 550, 272 NW2d 681 (1978), the Michigan Court of Appeals explained:

> Under Michigan case law *the scope of inquiry* on habeas corpus challenging the extradition of a fugitive is *limited to whether the demanding state has substantially charged the commission of a crime within its jurisdiction and whether the accused is the person so charged. In re Rayborn*, 18 Mich App 468; 171 NW2d 460 (1969). See also *Williams* v *Wayne County Sheriff*, 395 Mich 204; 235 NW2d 552 (1975), and MCL 780.19; MSA 28.1285(19). The purpose for this narrow inquiry is *to avoid any imposition upon the courts of this state* of the *duty to critically examine the laws of sister states with whose jurisprudence and criminal procedure our courts can only have a general acquaintance.* Such a duty would be an intolerable burden, certain to lead to errors in decision, "irritable to the just pride of the states, and fruitful of miscarriages of justice". *Pierce* v *Creecy*, 210 US 387, 403; 28 S Ct 714, 719; 52 L Ed 1113, 1121 (1908).
>
> (Emphasis added).

In *Michigan* v *Doran*, 439 US at 288-289, 99 S Ct 530, 58 L Ed 2d 521 (1978), this Court fully explained the rationale and the scope of a habeas hearing for extradition:

> Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art IV, § 2, cl 2, of the Constitution. *Biddinger* [v *Commissioner of Police*, 245 US 128, 132; 38 S Ct 41; 62 L Ed 193 (1917)]; *In re Strauss*, 197 US 324, 332, 25 S Ct 535, 537, 49 L Ed 772 (1905); R. Hurd, A treatise on the Right of Personal Liberty and the Writ of Habeas Corpus 598 (1858). *The [Extradition] Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial.*
>
> * * *
>
> Whatever the scope of discretion vested in the governor of an asylum state, cf. *Kentucky* v *Dennison*, 24 How 66, 107, 16 L Ed 717 (1861), the courts of an asylum state are bound by Art IV, § 2, cf. *Compton* v *Alabama*, 214 US 1, 8, 29 S Ct 605, 607, 53 L Ed 885 (1909), by § 3182, and, where adopted, by the Uniform Criminal Extradition Act. A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Cf. *Bassing* v *Cady*, 208 US 386, 392, 28 S Ct 392, 393, 52 L Ed 540 (1908). *Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide* (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding

> state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable.
>
> (Emphasis added).

This Court also instructed, 439 US at 290:

> Under Art IV, § 2, the courts of the asylum state are bound to accept the demanding state's judicial determination since the proceedings of the demanding state are clothed with the traditional presumption of regularity. In short, *when a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination.* Section 2, cl 2, Art IV, its companion clause in § 1, and established principles of comity merge to support this conclusion. *To allow plenary review in the asylum state* of issues that can be fully litigated in the charging state *would defeat the plain purposes of the summary and mandatory procedures authorized by Art IV, § 2.* See, e.g., *Sweeney* v *Woodall*, 344 US 86, 90, 73 S Ct 139, 140, 97 L Ed 114 (1952); *Marbles* v *Creecy*, 215 US 63, 69-70, 30 S Ct 32, 33-34, 54 L Ed 92 (1909); *Pierce* v *Creecy*, 210 US 387, 404-405, 28 S Ct 714, 719-720, 52 L Ed 1113 (1908).
>
> We hold that once the governor of the asylum state has acted on a requisition for extradition based on *the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had* on that issue in the asylum state.
>
> (Emphasis added).

In the instant case, Petitioner in his state appellate briefs conceded everything necessary for extradition. On page 2 of his briefs, he admitted:

> There is no question that the extradition papers in this case are in proper form on their face and that the Appellant is the person named therein.

For this Court to address the issues Petitioner seeks to raise would defeat the plain purposes of the summary and mandatory procedures of State and Federal extradition law. *Michigan* v *Doran*, 439 US at 290; *Pacileo* v *Walker*, 449 US 86, 88, 101 S Ct 308, 66 L Ed 2d 304 (1980).

Petitioner argues disingenuously that he is being improperly charged with conspiring on April 14, 1987 to commit a crime on March 14, 1987. However, the conspiracy charged in this matter is that of intentionally delivering a usable quantity of marijuana in an amount of more than 200 pounds but less than 2,000 pounds. That Petitioner on March 14, 1987 transported a usable quantity of marijuana in Michigan for which he was caught and convicted does not negate the Texas conspiracy which came to fruition on April 14, 1987 with Ysidro Castillo, Sr.'s possession in Navarro County, Texas of more than 200 pounds of marijuana. (Bill of Indictment, ¶ 5)

Clearly, Petitioner is properly charged with a crime in Texas. Under the limited standard of review of extradition decisions, he is not entitled to relief.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Respondent prays that this Honorable Court issue an order denying Petitioner's petition

for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

ROBERT C. WILLIAMS
CHIEF, APPELLATE DIVISION

By: /s/ MICHAEL J. MODELSKI
/s/ PAUL J. FISCHER
Counsel of Record
Assistant Prosecuting Attorneys
1200 North Telegraph Road
Pontiac, Michigan 48053
(313) 858-5557

DATED: January 24, 1990